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ATTORNEY AT LAW

Via ECF Only

May 23, 2007

Hon. Carol B. Amon
United States District Judge
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Steward v. City of New York
04 Civ. 1508 (CBA)(RML)

Dear Judge Amon:

I represented the plaintiff in this action before his death. I am writing (a) to respond to the Court's May 7, 2007 Order and (b) to move, pursuant to Fed. R. Civ. P. 6(b), to extend the time for plaintiff's successors to file a motion for substitution under Fed. R. Civ. P. 25(a).

I have been informed that plaintiff died intestate and that no administrator has yet been appointed to his estate. He is survived by four children, one of whom is a minor. I am in communication with two of plaintiff's three adult children, and they have communicated to me their desire to continue the lawsuit. One of them, Phoebe, has agreed to act as administratrix of the estate, and that is the person I anticipate will ultimately move for substitution. The third adult child lives in Korea. I am informed that he was estranged from plaintiff and I have had no contact with him. I have had no contact with the minor or his mother. Since one of his heirs is a minor, there will need to be appointed for the minor a guardian to represent him in the surrogate's court, and this must be done before an administratrix can be appointed. Furthermore, there is some friction between the adult daughters and the mother of the minor child, which makes communications difficult. Given these complexities, I expect that it will take some time to have letters of administration issued by the surrogate's court.

No motion for substitution under Rule 25(a) has been made because there is presently no administratrix or other appropriate person to substitute in. Arguably, Phoebe could substitute as plaintiff based on her status as heir and distributee of a estate distributed outside of probate, (*see Roe v. City of New York*, 2003 WL 22715832 (S.D.N.Y. 2003), but this would be inadvisable, because she would lack authority under state law to settle the action and because of the involvement of the minor heir. Accordingly, I believe that the best course of action is to wait until an appropriate person is appointed administratrix. *See Gronowicz v. Leonard*, 109 F.R.D. 624 (S.D.N.Y. 1986).

It is even unclear whether the 90 days in which to move for substitution has begun to run. The majority of courts that have considered the issue appear to hold that a suggestion of death must identify the successors or heirs to be substituted, (see *e.g.*, *Kessler v. Southeast Permanente Medical Group Of North Carolina, P.A.*, 165 F.R.D. 54 (E.D.N.C. 1995)). While the Second Circuit has rejected that interpretation of the rule, *Unicorn Tales, Inc. v. Banerjee*, 138 F.3d 467 (2d Cir. 1998), my reading of the rule is that the suggestion of death should at least be *served* on the successors. The reason for this is that the rule states that the suggestion of death is to be served "as provided herein for service of the motion." The motion (and thus the suggestion of death) is to be served "on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons." The "persons not parties" can only refer to the successors of the deceased party.

The above reading is only logical. The purpose of the suggestion of death is to require an appropriate person to assume the role of the deceased party. The consequence of non-action, dismissal, is highly prejudicial to the successors of the deceased party, and it is unthinkable (and of questionable constitutionality) that such a drastic penalty could be imposed without any requirement of notice. It is clear that I do not represent the heirs of plaintiff or the estate itself. *Roe v. City of New York, supra at *2.* At least one other court in this circuit has held that the suggestion of death must be served on the successor of the deceased party. *Gronowicz v. Leonard*, 109 F.R.D. 624 (S.D.N.Y. 1986). The Second Circuit did not address this issue in *Unicorn*. In that case, the suggestion of death was served upon the plaintiffs by the wife of a deceased defendant, who was also defendant's sole heir. Since in that case it was the successor herself who filed the suggestion of death, the issue as to service on "persons not parties" did not arise.

The apparent solution to the above is to extend, pursuant to Rule 6(b), the time to substitute parties under Rule 25(a). Whether the time to move has run or not, the cases uniformly hold that leave should be liberally granted in the absence of prejudice. *Kernisant v. City of New York*, 225 F.R.D. 422 (E.D.N.Y. 2005), *Gronowicz, supra, at 627.* In this case, there can be no claim of prejudice. The City's motion for summary judgment was submitted shortly after plaintiff's death, and oral argument was held in late April. Extending the time for plaintiff's successor to substitute will have absolutely no effect on this litigation. Given the complicating factors of plaintiff's estate, and given the fact that defendant's motion for summary judgment is pending, I respectfully suggest that the Court should extend the time to substitute until 30 days after the City's motion is fully determined.

To address the remaining items in the Court's May 7, 2007 order: I believe that all plaintiff's claims survive his death ("No cause of action for injury to person or property is lost because of the death of the person in whose favor the cause of action existed. For any injury an action may be brought or continued by the personal representative of the decedent" N.Y. Est. Powers & Trusts Law § 11-3.2). I do not believe that plaintiff's daughter will continue the action as a class action, although is possible that some third party would seek to intervene as a class representative. That issue need not be addressed at present because the claims that are pleaded as a class action are presently stayed until after the pending motion is determined.

Respectfully submitted,

/s/ Michael G. O'Neill

cc: All counsel of record (by ECF only)